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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 348.

NATHAN BLOOMBERG,

Petitioner,

against

FRANK RADICH,

Respondent.

On Petition for Writ of Certiorari to the New Jersey Court of Errors and Appeals.

BRIEF OF RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NATHAN BLOOMBERG,

Petitioner,

VS.

FRANK RADICH,

Respondent.

BRIEF FOR RESPONDENT.

Opinion Below.

The opinion of the New Jersey Court of Errors and Appeals is printed in the appendix of the petitioner's brief at page 19 and is reported in 140 N. J. Equity reports at page 289, 54 A. 2d 247. This opinion reversed the orders under review made by the Hon. Charles M. Egan, Vice-Chancellor, which orders had permitted the opening of the final decree in foreclosure proceedings theretofore instituted by the respondent in which the petitioner herein was named one of the party defendants.

Statement of the Case.

The petition filed herein seeks to review on Writ of Certiorari the decision of the New Jersey Court of Errors and Appeals reversing orders of the Court of Chancery of New Jersey entered on the advice of Vice-Chancellor Egan under the Soldiers' and Sailors' Civil Relief Act of 1940, Title 50 U. S. C. A. App., Section 501, etc.

On November 29, 1943, a final decree was entered in this

cause (p. 29), directing that a writ of execution be issued to the Sheriff of Bergen County to sell the mortgaged premises which were located in the Borough of Cliffside Park, Bergen County, New Jersey. Pursuant to this decree the premises were sold to complainant and the sale duly confirmed.

On January 30, 1946, Nathan Bloomberg, one of the defendants therein, filed a petition with the Court of Chancery (p. 1), alleging, *inter alia,* that at the time of the entry of the final decree he was in the Military Service; that he was deprived of his rights under the Soldiers' and Sailors' Relief Act of 1940; that no process of subpoena issued to him; that he was greatly prejudiced and injured by said final decree, and had no opportunity of setting up his defenses; that he had no knowledge of the suit against him; that the final decree was procured without due process of law; and that he was deprived of his property without due process of law.

On January 30, 1946, an Order to Show Cause was issued, based on this Petition (p. 9), requiring the complainant, Frank Radich, to show cause why the final decree and, "any other decrees of this Court made in this cause should not be opened, set aside, vacated and for nothing holden, on the ground that the Court was fraudulently induced to make said decree."

A motion was made by complainant to dismiss the petition to reopen (Notice, p. 11), on grounds which are incorporated in the Grounds of Appeal.

This motion was denied by Vice-Chancellor Egan on the ground that the defendant, Nathan Bloomberg, was entitled by virtue of 50 U. S. C. A. App., Sections 525 and 532, to make application to open the decree during the period of his military service or within three months thereafter (Memorandum, p. 13; Order, p. 16). A further order was entered opening the interlocutory and final decrees and granting the defendant, Nathan Bloomberg, 20 days in which to answer the Bill of Complaint herein (p. 18).

ARGUMENT.

POINT I.

No right to open the decrees herein can be based upon the Soldiers' and Sailors' Relief Act of 1940 because petitioner, Nathan Bloomberg, did not comply with the terms of that Act.

The Federal Soldiers' and Sailors' Civil Relief Act provides in Section 520 of Title 50 U. S. C. A. App. as follows:

> "(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

Under this section it must not only appear that the person in military service was prejudiced by reason of his service, but in addition, the judgment may not be opened unless two separate and independent conditions precedent are complied with:

1. The application must be made not later than ninety days after the termination of military service.

2. There must be a showing that defendant has a meritorious or legal defense to the action or some part thereof.

The affidavit of petitioner indicates that he was discharged from the military service on October 30, 1945, or more than ninety days prior to the application to reopen. Similarly, there is complete non-compliance with the second condition precedent through the failure of the petition to contain any semblance of an allegation to show a meritorious or equitable defense to the action or some part thereof. The situation is, therefore, identical with that in *Combs* v. *Combs* (N. C.), 1004 S. E. 656, where the Court considered a section of the 1918 Act which included provisions having the same language as the applicable provisions of the 1940 Act. The Court held:

> "We are of opinion that the motion to set aside the judgment was properly denied.
>
> "(1) First. The defendant failed to make his motion not later than 90 days after the termination of his service in the army.
>
> "(2) Second. It is nowhere made to appear that the defendant has a meritorious or legal defense to the action. In his affidavit the defendant fails to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required

to set out the facts constituting his defense. Stockton v. Cold Mining Co., 144 N. C. 595, 57 S. E. 335; Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269."

See also *Commercial Credit Corp.* v. *Smith* (Tex.), 187 S. W. 2d 363.

It is submitted that paragraph 3 of section 532 to which Vice-Chancellor Egan referred in his memorandum, when read in connection with the other paragraphs of this section, indicates that it was intended to apply to situations where no final judgment or decree had been entered by a court of competent jurisdiction. In *Keller* v. *Rodie* (Ill.), 61 N. E. 2d 387, the Appellate Court of Illinois held that both sections 2 and 3 of section 532 must be construed together. The Court there said at page 392:

"We think the words 'or otherwise' in sub-section (3) of section 532 relate only to a sale, foreclosure or seizure of the same class as 'under a power of sale, under a judgment entered upon a warrant of attorney to confess judgment contained therein.' This view is borne out by the fact that a sale or seizure under a power of sale or under a judgment by confession may deprive the defendant of his property so seized and sold without any notice to him or any opportunity to make a defense, and the manifest object of this sub-section is to prevent such an occurrence, as demonstrated by the latter part of the same sub-section."

Section 525 of Title 50 U. S. C. A. App. is also cited as authority for the opening of the decree herein. An examination of this section discloses two separate classes of relief. The first dealing with causes of action by or against someone in the military service by tolling the running of the Statute of Limitations; the second, in favor of persons in the military service, by excluding time in the service from the period providing for the redemption of real property sold or forfeited to enforce any obliga-

tion, tax or assessment. It will be noted that both classes deal with limitations of actions and not with the reopening of judgments or decrees. An examination of the decisions construing the Soldiers' and Sailors' Civil Relief Act reveals that the courts have on many occasions referred to Section 520 in connection with applications to reopen judgments or decrees entered after judicial proceedings. *Bell* v. *Niven, et al.* (Ill.), 35 S. E. 2d 182; *Commercial Credit Corp.* v. *Smith* (Tex.), 187 S. W. 2d 363. However, counsel for respondent, despite a diligent search, has not discovered a single case in other jurisdictions where Section 525 has been used as authority for reopening a final decree, such as the foreclosure decree herein. Section 525 was invoked in the case of *Illinois National Bank of Springfield, et al.* v. *Gwinn, et al.* (Ill.), 61 N. E. 2d 249, but only for the purpose of extending during military service a redemption period which existed under the State Statute there considered. This redemption period commenced at the completion of foreclosure proceedings and continued for a period of one year thereafter. No new right of action is created under Section 525, and since there is no right of redemption in New Jersey after final decree of foreclosure, it is submitted that this Section has no application to the issue herein.

POINT II.

The petition of Nathan Bloomberg fails to set forth facts which would justify the exercise of an equitable discretion in reopening and vacating the decree herein.

It seems clear from a reading of the provisions of the Soldiers' and Sailors' Relief Act and the decisions construing these provisions, that the act did not suspend the exercise of judicial power to acquire jurisdiction over, nor grant exemption from civil process to, persons in the military service. *Kurilla* v. *Roth*, 132 N. J. L. 213, 38 A.

2d 862. For these reasons, since the Court had jurisdiction over the petitioner, as an examination of the original papers on file reveals, the issue narrows down to a consideration of the principles of law enunciated by the courts of this State which would be applicable if defendant had not been in military service.

The rule seems settled in New Jersey that after the time limited for taking an appeal has passed, a final decree will not be opened except for fraud or newly discovered evidence. *Fidelity Union Trust Co.* v. *North Jersey Poultry Co.*, 123 N. J. E. 259, 197 A. 65; *Strong* v. *Strong*, 136 N. J. E. 361; *Better Plan Building & Loan Assn.* vs. *Forman*, 124 N. J. E. 561, 3 A. 2d 453; *Miller* v. *McCutcheon*, 117 N. J. E. 123, 175 A. 155.

But the petition to reopen is barren of any factual allegations to support either of these grounds. The unsupported allegation in the Order to Show Cause that the Decree was fraudulently induced is not a substitute for facts. Furthermore, it appears by the defendant's own affidavit that he had knowledge of the suit while it was pending but did nothing about it. Under these circumstances it is submitted that defendant has failed to allege sufficient grounds to justify the Court in exercising its discretion to justify the Court in exercising its discretion to reopen the Final Decree. While the power of the Court of Chancery to open and vacate a final decree on Petition and Order to Show Cause is settled, it is respectfully submitted that the defendant making the application must lay a factual foundation in his petition and supporting proof to justify such relief. The party holding the decree is entitled to know from the outset what case he will be called upon to meet. *In re: Kuser's Estate*, 132 N. J. E. 260, 26 A. 2d 688.

Sound jurisprudence and public policy dictate that applications to reopen decrees should be considered with great caution and should not be granted when the result is injurious to the complainant. *Steinhardt Bros. & Co.* v.

Cohen, 86 N. J. E. 323, 98 A. 637; *Hudson Trust Company* v. *Boyd*, 80 N. J. E. 267, 84 A. 715.

Chief Justice Brogan in *Miller* v. *McCutcheon, supra*, at page 130, stated:

> "It should also be observed that the final judgments of our courts would be seriously jeopardized and property rights stand on very insecure foundations if rehearings and bills of review were entertained to vacate final decrees, when the time to appeal has passed, and others have acquired vested rights, save in the well recognized instances herein mentioned."

See, also, *Wootton* v. *Pollock*, 125 N. J. E. 432, 6 A. 2d 216.

Conclusion.

For the foregoing reasons, respondent respectfully prays that the Writ of Certiorari be denied.

Respectfully submitted,

MILTON T. LASHER,
Attorney for and of Counsel with Respondent, Frank Radich.